



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 3102/2016

In the matter between:

TERTIUS BOTHMA N.O.
CARINE BOTHMA N.O.

First Plaintiff
Second Plaintiff

and

PELHAM STEPHANUS BOTHMA
S BOTHMA & SEUN TRANSPORT (EDMS) BPK
MERINO BOERDERY BELANGE (EDMS) BPK
PELHAM STEPHANUS BOTHMA N.O.
JOHANNA ELIZABETH BOTHMA N.O.
JAN FW BASSON N.O.
LOUIS BOTHMA (JUNIOR) N.O.
JAN FW BASSON N.O.
PELHAM STEPHANUS BOTHMA N.O.
MAVIS CILLIERS N.O.

First Defendant
Second Defendant
Third Defendant
Fourth Defendant
Fifth Defendant
Sixth Defendant
Seventh Defendant
Eighth Defendant
Ninth Defendant
Tenth Defendant

CORAM:

NAIDOO, ADJP

HEARD ON: 14 JUNE 2019

DELIVERED ON: 18 JUNE 2019

- [1] This is an application for leave to appeal against a judgment of this court written by my colleague Rampai ADJP (as he then was). The trial proceeded over a period of 20 days and appears to have concluded on 30 October 2018. The judgment was delivered on 24 January 2019. In the absence of Rampai J, who is currently on long leave and could not see his way clear to attend to this matter, the Application for Leave to Appeal was allocated to me to deal with. The pleadings, exhibits, transcribed record, the judgment, the Application for Leave to Appeal and all the additional documents filed in this matter, number approximately 3000 pages (possibly more). As is my practice, I usually deliver short judgments in applications for leave to appeal. While I will endeavour to keep to that practice as far as possible, I am aware that this judgment will, of necessity, be longer than usual, due to the number of issues raised by both parties. For convenience, I will refer to the applicants as the defendants and the respondents as the plaintiffs
- [2] This was an action instituted by the plaintiffs against the defendants, arising from a Deed of Settlement entered into between the parties, and made an order of court. The defendants allegedly failed to fulfil their obligations as stipulated in the Deed of Settlement, and the plaintiffs' cause of action was accordingly based on such alleged breach. It was not in dispute that the Deed of Settlement stipulated that the defendants, jointly and severally, were obliged to deliver to the plaintiffs 100 000 m³ of "clean sand",

excluding topsoil, which was to be heaped in a pile in the mine area situated along the weighbridge on the farm Boschbank, within six months of the date of signing of the Deed of Settlement. It was essentially the defendant's alleged breach of these obligations that was the subject of the action and trial before Rampai J. Ultimately, the interpretation of the term "skoon sand" (clean sand) written in the contract lay at the heart of the matter, in order to determine if the defendants had indeed breached the agreement. Adv AP Joubert SC, with Adv PG Leeuwner appear for the plaintiffs and Adv A Subel SC, with Adv C Acker appear for the defendants.

[3] The defendants assailed the judgment of the trial court on some 53 grounds which are extensively set out in the Notice of Application for Leave to Appeal. It is unnecessary to repeat those grounds here, save to say that in essence the defendants allege that the trial court erred in the interpretation of the agreement between the parties and in accepting the plaintiffs' version and rejecting that of the defendants. If necessary, I will refer briefly to such of the grounds of appeal as may be germane to this judgment.

[4] The test to be applied in an application for leave to appeal is regulated by section 17 of the Superior Courts' Act 10 of 2013 (the Act). Section 17(1)(a) is of relevance in this matter and provides:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) The appeal would have a reasonable prospect of success

(b) There is some other compelling reason why the appeal should be heard..."

(my underlining and emphasis)

Section 17 changes the position somewhat in respect of the test to be applied. Previously, an applicant was merely required to show that there is a reasonable possibility that a court, differently constituted, may come to a different conclusion than the court *a quo*. The test in terms of section 17 requires the applicant to show that there is a reasonable prospect of success and not merely a possibility.

In the matter of **Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8June 2017)**, a decision of my colleague, Daffue J, emanating from this Division, he said at paragraph 5, and I agree, that:

“There can be no doubt that the bar for granting leave to appeal has been raised. Previously, the test was whether there was a reasonable prospect that another court might come to a different conclusion. Now, the use of the word “would” indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. See *Acting National Director of Public Prosecutions and Others v Democratic Alliance (19577/2009) [201]6 ZAGPPHC 489 (24 June 2016)*.

The use by the legislature of the word “only”, emphasised *supra*, is a further indication of a more stringent test.”

Similar views were expressed in **Ntsoereng +1 v Sebofi +1, In Re: Sebofi v Ntsoereng 4518/2012) [2016] ZAFSHC 153 (7July 2016)**, and **The Mont Chevaux Trust v Tina Goosen +18 2014 JDR LCC at para [6]**. Both counsel also referred me to a number of other matters where similar views were articulated. [See **Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd [2017] All SA 568 (WCC) at 572, para [10]; Notshokovu v S (157/15) [2016] ZASCA 112 (7 September 2016)**

- [5] I have read the extensive judgment of Rampai J and taken note of the heads of arguments presented by both counsel at the end of the trial and for the purposes of this hearing, as well as the

extensive oral arguments before me. Both counsel also provided me with an indication of which parts of the voluminous record should be read, and I thank them for that. It is necessary to remind ourselves that this is not a re-hearing of the matter, nor is this court a court of appeal. The guiding principle, in terms of section 17(1) of the Act is whether the appeal would have reasonable prospects of success. I shall endeavour to confine myself to that consideration.

- [6] The court *a quo* dealt comprehensively with the law relating to the interpretation of contracts, statutes and other documents, as enunciated in **Coopers and Lybrand and Others v Bryant 1995(3) SA 761 (A) at 768 A-E**, as well as the change in the approach to interpretation in South Africa, creating the current trends in interpretation. The latter position was dealt with by the Supreme Court of Appeal in three matters, namely, **KPMG Chartered Accountants (SA) v Securifin Ltd and Another 2009 (4) SA 399 (SCA)**; **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 603F – 604E**, and **Bothma Batho Transport (Edms) Bpk v Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 SA para [12]**.
- [7] In essence, it has been established that the interpretation of a contract or document is one unitary process, where the literal meaning of the words, through which the parties have expressed their contractual intentions, must be considered in the light of all relevant and admissible context. In doing so, the court must be loyal to the text of the contract, and in the case of commercial contracts, the court should lean in favour of a commercially sensible construction. (**Batho Bothma** supra). Context or the factual matrix relevant to the agreement or contract contended for by the parties, becomes very important and it is crucial for a court engaged in interpreting a contract to diligently consider every

relevant factor. As I alluded to earlier, the defendants in the present matter raised a number of grounds of appeal. I shall deal with three of those, which I consider important for current purposes. That is not to say that the other grounds are not important. In my view, the three grounds I will deal with are mentioned for the purpose of determining whether the appeal would have a reasonable prospect of success.

- [8] It is common cause that the plaintiffs in this matter sued the defendants in this matter, in an action under case number 1231/2011 for payment of just over R99 million (Ninety Nine Million Rand). This was monies the plaintiff claimed as the cost of rehabilitating a sand mine, which the defendants failed to do, or to complete in terms of a previous court order. The summons set out extensively what was required in order to rehabilitate the mine in question, that the defendant's had failed to rehabilitate the mine as stipulated, and alleged that it would cost approximately R99 million for the plaintiffs to do so, in the face of the defendants' failure to rehabilitate the mine. The trial commenced before my colleague, Jordaan J.

It emerges that an inspection *in loco* was held, which the presiding judge attended. What also emerged from the evidence is that the defendants in attempting to rehabilitate this mine, filled the large hole with builder's rubble, including tiles and other such material. The correspondence as well as the summons in this regard indicated that this was big concern and caused a great deal of dissatisfaction to the first plaintiff, who wanted all of the material used by the defendants to be removed. It is alleged that, for the purposes of the inspection *in loco*, the plaintiffs had dug up the contents of the hole filled by the defendants in order to demonstrate to the presiding judge that building rubble and other unsuitable material used by the defendants. It is common cause

that the plaintiff's case then was that the hole in the mine was a threat to the lives and safety of humans and animals, hence the concern over the defendant's failure to properly fill the hole.

- [9] The trial was subsequently settled before all the evidence was led. The parties did not communicate personally with each other at all during the settlement negotiations, but did so via their respective legal representatives. A written settlement agreement was eventually compiled and signed by the parties. It is the settlement agreement, which was made an order of court by Jordaan J, that is the subject of the current matter. The defendants contend that the finding of the trial court that the action before Jordaan J had nothing to do with rehabilitation of the mine but everything to do with money, was factually incorrect, as the money was claimed for the purpose of rehabilitating the mine. They contend further that the settlement agreement was premised on the basis that, due to the plaintiffs' unhappiness with the building rubble that was initially used,

they agreed on delivering "clean sand" for the purpose of rehabilitating the mine. There was never any agreement that commercially saleable sand, within the extended definition of "clean sand" alleged by the plaintiffs, would be delivered. Their understanding of "clean sand" was sand without building rubble.

- [10] It is evident from the judgment that the trial court did it not grapple with this aspect in determining what the intention of the parties was at the time of signing the settlement agreement. There was extensive evidence from the soil scientist, Dr Van Der Waals, who testified on behalf of the plaintiffs regarding the meaning of "clean sand". It seems that the plaintiff and the trial court relied on this

definition in alleging that the defendants were in breach of the order of court. The plaintiffs in oral argument before me denied this. I note that Dr Van Der Waals report came to the attention of the plaintiffs some three years after the settlement agreement was made an order of court by Jordaan J. The defendants contend that the definition of “clean sand”, as expounded by De Van Der Waals could not have been within the contemplation of the plaintiffs at the time of signing the settlement agreement. In my view, this is a very relevant factor to have been considered in interpreting the meaning of “clean sand” in the settlement agreement, and may well lead to another court making a different finding in this respect.

- [11] It is an established rule of interpretation that the evidence of witnesses, including expert witnesses, is not admissible in determining the meaning of words or terms used in a contract or agreement. The Supreme Court of Appeal said in the KPMG case *supra* that “interpretation is a matter of law and not fact, and, accordingly, interpretation is a matter for the court and not for the witnesses”.

Mr Subel pointed out a number of instances in the judgment of the trial court where it is apparent that the trial court relied on the evidence of Dr Van Der Waals (and rejected the evidence of the defendants’ expert, Mr Jeffrey) to interpret and give meaning to the words “skoon sand”. These are paragraphs 87, 88, 91 and 138. Mr Subel argued that in paragraph 128, the trial court not only relied on the evidence of Dr Van der Waals but also the first plaintiff, Tertius Bothma, to interpret the meaning of “skoon sand”

- [12] Mr Joubert denied that the plaintiffs led the evidence of its experts to interpret the meaning of the words in the agreement, or that the court relied on the evidence and opinion of the expert, Dr Van der Waals to interpret the agreement. Mr Subel referred me to the summary of Dr Van der Waals’ expert report in Bundle 2, page 58,

where he gives his opinion on the scientific definition of “skoon sand”. The plaintiffs’ legal representative then led Dr Van der Waals on this aspect in evidence in chief and obtained confirmation that this was his opinion in respect of the definition. (see transcript Volume E, pages 134 and 150). This, Mr Subel argued, influenced the whole of the court’s judgment. It is difficult to disagree with that perception.

- [13] Another important aspect raised by the defendants is the trial court’s handling of its assessment of the evidence of the defendant’s expert, Mr Jeffrey, and that of the plaintiffs’ expert, Dr Van Der Waals. The defendants pointed out that the trial court, in criticising Mr Jeffrey, simply quoted almost verbatim in some paragraphs of its judgment, the plaintiff’s heads of argument handed up at the end of the trial. The defendants mentioned paragraphs 93 to 105 of the judgment.

I conducted an examination of the judgment and the plaintiff’s heads of argument and found that from paragraph 91 to 117 of the judgment, the trial court had quoted, verbatim in most them, paragraphs 70 to 91 of the plaintiff’s heads of argument, without indicating that it was quoting from the plaintiff’s heads. In addition the defendants pointed out that the trial court sets out in paragraphs 135 to 142 of its judgment what is ostensibly its assessment of Jeffrey’s evidence. Closer examination reveals that these paragraphs are a repetition of a table marked “A”, annexed to a document titled “Plaintiff’s Response to Some Matters Raised in Defendant’s Heads of Argument”. This was handed up by the plaintiffs’ counsel during the oral arguments in court. A cursory perusal of other parts of the judgment reveal that these were not the only instances.

- [14] While it is not inappropriate for a court to borrow from the heads of argument of counsel, where there was a well written summary of

the facts or a good exposition regarding the evidence or law, it is at least expected of the court to indicate that it has done so, in order to acknowledge the source and to avoid any perception of bias, on the part of the opposing party. What was quoted by the trial court in this matter is clearly the plaintiffs' views of the evidence, which logically would favour its version. The plaintiffs' assessment of the evidence led on behalf of the defendants omitted those parts of the evidence that were favourable to the defendant's case. The unease of the defendants is not unjustified, when they assert that "In relying so extensively and uncritically on the Plaintiff's submissions, without objectively considering the veracity thereof", the court erred in a number of respects both in its criticism of Jeffrey as well as in the rejection of his evidence.

In this regard, Mr Stubel referred me to the case of **Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd 2011(1) SA 267 (CC)**, where there was an application for recusal of the presiding judge in the court *a quo*, who copied the written heads of argument of the respondent's counsel. Although the Constitutional Court (CC) dismissed the application for leave to appeal to it against the Full Court's dismissal of the appeal on that ground, holding that it is not in the interests of justice for the CC to hear the matter, the CC remarked that its dismissal of the application for leave to appeal should not be seen as an endorsement of the main judgment (ie of the court *a quo*). The court also held that its dismissal of the application for leave to appeal was not an endorsement of the Full Court's findings that the judgment did not give rise to bias or a perception of bias. As I indicated, the perception of bias, and a failure by the court *a quo* to independently assess the evidence led by the defendants, is difficult to ignore. This in my view, read together with the other

grounds of appeal, has a reasonable prospect of attracting the interference of the appeal court.

- [15] The defendants also assailed the order made by the trial court on grounds that, in my view, are logical. It does appear that the trial court arbitrarily chose to base its order on the cost of plastering sand and not on the cheaper building sand. No reasons were put forward for this in order to understand why the court was exercising its discretion in the manner it did. I am consequently of the view that on the grounds I have mentioned as well as a number of other grounds, the appeal would have a reasonable prospect of success.
- [16] Mr Subel submitted that in the event of this court granting leave to appeal, such appeal should lie to the Supreme Court of Appeal (SCA), on the basis that the quantum is large and that the trial court made findings of dishonesty against the defendants' witnesses. I understand Mr Subel to say that such findings are unjustified, as he asserts that the application should be granted in order for these witnesses to vindicate themselves. Mr Joubert submitted that there is no reason for the matter to be referred to the SCA, and that the Full Court is the first port of call in terms of section 17 (6) of the Act.

Section 17(6)(a) reads thus:

“(a) If leave is granted under subsection (2) (a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

- (i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

- (ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal”.

[17] In this matter, the interpretation of the agreement between the parties was central to the determination of the various other issues. The trial court appears to have erred in applying the principles and rules of interpretation to the facts of this case. As such, this matter involves a question of law, which requires the attention of the SCA. In my view, the SCA would be the correct forum to hear an appeal in this matter.

[18] In the circumstances, the following order is made:

- 18.1 The applicant is granted leave to appeal against the whole of the judgment of the court *a quo*, to the Supreme Court of Appeal
- 18.2 The costs of this application are to be costs in the appeal.

S. NAIDOO, J

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